Gelombang Sepadu Sdn Bhd v Tal Seng Enterprise Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–422 OF 1995
KAMALANATHAN RATNAM J
12 NOVEMBER 1998

Land Law *— Trespass — Sub-tenancy validly terminated — Whether defendant became trespasser when it failed to deliver vacant possession on or before date stipulated in notice of termination*

Land Law *— Classification of land — Valuation — Land was agricultural land but used for commercial purposes — Whether illegal for court to assess land on commercial valuation basis*

The plaintiff was the registered owner of a piece of land ('the land'). The defendant had entered into the land as a sub-tenant of the main tenant and had been paying monthly rentals to the main tenant. The plaintiff commenced proceedings and obtained summary judgment for the recovery of the land after having given written notice on 29 April 1995 demanding vacant possession. The defendant did not appeal against this decision and handed over vacant possession of the land on 9 August 1996. The learned deputy registrar then assessed damages and awarded a sum of RM537,760 with costs on the basis of a commercial valuation. The defendant appealed against the award of damages, arguing that since the title to the property was stamped with the words 'agricultural land', it would be illegal for the court to assess the land on a commercial valuation basis, since there has been no conversion. The defendant also argued that by way of an oral agreement, it had obtained a sub-lease from the main tenant and therefore was not a trespasser.

Held, dismissing the appeal with costs:

(1) Since summary judgment for vacant possession was granted and the defendant held liable in damages, the court must have held the view that the tenancy was validly determined by the notice dated 29 April 1995 and that by that notice the defendant became a trespasser when it failed to deliver vacant possession on or before 31 May 1995 as stipulated in the letter (see p 191A–B); *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* [1987] 2 MLJ 611 followed.

(2) The stamping of the phrase 'lease for agricultural land' was not conclusive proof that the land was limited to agricultural use only. Also, even if the court were to consider the issue of illegality, the defendant could not avail himself of his own act of illegality in using agricultural land for commercial purposes and to use such illegality as a defence, after having benefited from such illegal conduct (see pp 191H–I, 192A); *Garden City Development Bhd v Collector of Land Revenue, Federal Territory* [1982] 2 MLJ 98 and

Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Sdn Bhd [1987] 1 MLJ 302 followed. A

[Bahasa Malaysia summary

Plaintif merupakan pemilik berdaftar sebidang tanah ('tanah tersebut'). Defendan telah memasuki tanah tersebut sebagai penyewa kecil bagi penyewa utama dan telah membayar sewa bulanan kepada penyewa utama. Plaintif memulakan prosiding dan memperolehi penghakiman terus untuk mendapat balik tanah tersebut setelah memberi notis bertulis pada 29 April 1995 untuk menuntut milikan kosong. Defendan tidak merayu terhadap keputusan ini dan menyerahkan milikan kosong pada 9 Ogos 1996. Timbalan pendaftar yang arif kemudiannya menaksir ganti rugi dan mengawardkan jumlah sebanyak RM537,760 dengan kos atas dasar penilaian komersil. Defendan merayu terhadap award ganti rugi, dengan menghujahkan bahawa memandangkan hakmilik harta tersebut dicapkan dengan perkataan-perkataan 'tanah pertanian', adalah menyalahi undang-undang untuk mahkamah menaksir tanah tersebut atas dasar penilaian komersil, disebabkan tiadanya penukaran. Defendan juga berhujah bahawa melalui perjanjian lisan, ia telah memperolehi pajakan kecil daripada penyewa utama dan dengan itu bukanlah penceroboh. B C D E

Diputuskan, menolak rayuan dengan kos:

(1) Oleh kerana penghakiman terus untuk milikan kosong dibenarkan dan defendan wajib membayar ganti rugi, mahkamah mestilah telah berpendapat bahawa penyewaan itu telah diputuskan secara sah melalui notis bertarikh 29 April 1995 dan bahawa melalui notis tersebut defendan telah menjadi penceroboh apabila ia gagal menyerahkan milikan kosong pada atau sebelum 31 Mei 1995 seperti yang ditetapkan dalam surat tersebut (lihat ms 191A–B); *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* [1987] 2 MLJ 611 diikut. F G

(2) Ungkapan 'pajakan untuk tanah pertanian' bukanlah bukti yang tidak dapat dipertikaikan bahawa tanah tersebut adalah terhad kepada penggunaan pertanian sahaja. Lagipun, jikalau mahkamah menimbangkan isu kepenyalahan undang-undang, defendan tidak boleh menggunakan perbuatan kepenyalahan sendirinya dalam menggunakan tanah pertanian untuk tujuan komersil dan untuk menggunakan kepenyalahan demikian sebagai satu pembelaan, selepas mendapat faedah daripada kelakuan haram begitu (lihat ms 191H–I, 192A); *Garden City Development Bhd v Collector of Land Revenue, Federal Territory* [1982] 2 MLJ 98 dan *Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Sdn Bhd* [1987] 1 MLJ 302 diikut.] H I

A **Notes**

For a case on trespass by a former tenant, see 8 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2977.

For cases on classification of land generally, see 8 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1570–1574.

B

Cases referred to

Garden City Development Bhd v Collector of Land Revenue, Federal Territory [1982] 2 MLJ 98 (folld)

Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Sdn Bhd [1987] C 1 MLJ 302 (folld)

Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang [1987] 2 MLJ 611 (folld)

Legislation referred to

D Rules of the High Court 1980 O 14

S Sivaneindiren (*Cheah Teh & Su*) for the plaintiff.

T Jayadeva (*Syarikat Radhakrishnan*) for the defendant.

Cur Adv Vult

E

Kamalanathan Ratnam J:

Facts

The plaintiff is the registered owner of a piece of land known as CT 26519, F Lot No 10243, Mukim Batu, District of Kuala Lumpur ('the said land'). The defendant had entered into the said land as a sub-tenant of the main tenant, one LWL Trading & Construction Sdn Bhd ('LWL'), sometime in November 1986 and had been paying monthly rentals to the main tenant, of between RM1,000 to RM1,500. Forty six receipts to this effect had been exhibited.

G

The plaintiff commenced proceedings for the recovery of that portion of the land as occupied by the defendant by way of this action after having given written notice on 29 April 1995 demanding vacant possession. The plaintiff appointed a surveyor who identified the portion of land occupied by the defendant as measuring 127,800 square feet. H This evidence was never challenged by the defendant. The plaintiff obtained summary judgment on 12 July 1996 under O 14 of the Rules of the High Court 1980 for vacant possession of the 127,800 square feet of land occupied by the defendant, together with an order for damages to be assessed and costs. The defendant did not appeal against this decision and handed over vacant possession of the 127,800 square feet I of land on 9 August 1996. The learned deputy registrar then assessed damages and awarded a sum of RM537,760 with costs on the basis of a commercial valuation.

The appeal

This is an appeal by the defendant against the said award of damages, the defendant arguing that it was wrong to assess damages on the basis of a commercial valuation since the plaintiff's own valuer's report had stated the land to be under 'agricultural' category.

Court's findings

Issue of trespasser

The plaintiff contends that the defendant was a trespasser. An affidavit in support of the application for summary judgment affirmed by a director of the plaintiff confirms that the plaintiff purchased the said land on 20 January 1995. In its defence, the defendant had pleaded that it was a sub-tenant of LWL. In its affidavit in reply affirmed by one Low Swee Hock, the manager of the defendant, had annexed as exhibit, LSH–1, a letter from one Seong Jaya Sdn Bhd ('Seong') confirming that LWL was its tenant as of 1 April 1982. There was also an express term in the said letter that LWL had undertaken to inform Seong immediately if there were any trespassers on the said land. A copy of the title to the said land exhibited by the plaintiff in support of the application for summary judgment shows that Seong was the registered owner of the said land and that it had sold the said land to the plaintiff on 20 January 1995. The defendant then averred that as of November 1986 by way of an oral agreement, it had obtained a sub-lease from LWL and annexed 46 receipts to substantiate the sub-tenancy.

In spite of this, the plaintiff contends that based on the pleadings and the order of the learned judge granting vacant possession, I ought to hold that the defendant was in unlawful occupation of the said land.

I had perused the order of the court dated 12 July 1996. All it says is that the plaintiff is entitled to vacant possession of the said land with damages to be assessed. Since no written judgment has been given and since the order of the court makes no mention of any finding that the defendant was in unlawful occupation or was a trespasser, I cannot accede to the plaintiff's submission that the defendant was a trespasser or that the defendant was in unlawful occupation of the 127,800 square feet of land. I also find the submission of the plaintiff that the issue of sub-tenancy is now res judicata, as having been decided by the learned judge who heard the summary proceedings, unacceptable. Since no finding has been made by the learned judge as to the issue of sub-tenancy on the part of the defendant, I cannot hold that res judicata applies, even though the defendant had not appealed against the O 14 application. If the plaintiff was dissatisfied with any of the documents annexed as exhibits by the defendant, namely the receipts, surely the plaintiff could have applied to cross-examine any of the makers.

From date of notice to repossession

In *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* [1987] 2 MLJ 611, the Supreme Court held that on the expiry

of the period specified in the notice and the landlord showing an intention to repossess, the defendant became a trespasser on the land. In the circumstances of this case, since summary judgment for vacant possession was granted and the defendant held liable in damages, the court must have held the view that the tenancy was validly determined by the notice dated 29 April 1995 and that by that notice the defendant became a trespasser (following the decision of the Supreme Court) when it failed to deliver vacant possession on or before 31 May 1995 as stipulated in the said letter. In consonance with this, I also note that the plaintiff is indeed seeking damages from 1 June 1995 till the time vacant possession was obtained.

The assessment

During the course of the proceedings for assessment of damages on 20 January 1998, the deputy registrar granted leave to the defendant to cross-examine two deponents, namely the valuer, in respect of his valuation report, and the plaintiff's representative.

It is not in doubt that in his valuation report, the valuer had stated that the land was held under category 'agricultural' and this was confirmed by him in cross-examination. To date there is no evidence of any application for conversion of the said land to the relevant authorities, from agriculture to commercial status. It is also not disputed that the valuer prepared his valuation report of the said land on the basis of commercial valuation, on the instruction of the plaintiff to that effect. Therefore based on the valuer's report, the plaintiff claimed damages in respect of the land area of 127,800 square feet at RM0.35 per square foot being the rental value of the said property on commercial basis. The deputy registrar awarded damages at RM0.30 per square foot for 127,800 square feet from 1 June 1995 to 31 July 1996 together with interest and costs based on the commercial valuation basis. The defendant cited numerous cases drawing an analogy from cases decided based on the Land Acquisition Act 1960.

It is not in dispute (and as admitted by the defendant in its affidavit) that it had utilized the land for a commercial purpose, namely a hardware business.

Can the defendant now raise illegality

The defendant now contends that since the title to the property is stamped with the words 'agricultural land', it would be illegal for the court to assess the said land on a commercial valuation basis, since there has been no conversion.

I can look at this submission from two angles, both of which ill-favour the defendant. Firstly, in *Garden City Development Bhd v Collector of Land Revenue, Federal Territory* [1982] 2 MLJ 98, the Privy Counsel held that the stamping of the phrase 'Lease for Agricultural Land' (exactly as the case before me) is not conclusive proof that the land is limited to agricultural use only. This view is clearly illustrated in this case by the defendant's own admission that he had been using the said land for commercial purpose.

Secondly, even if I were to consider the issue of illegality, the defendant cannot avail himself of his own act of illegality in using agricultural land for commercial purposes and to use such illegality as a defence, after having benefited from such illegal conduct.

In *Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Sdn Bhd* [1987] 1 MLJ 302, the (then) Supreme Court held that a party cannot take advantage of his own wrong-doing. Having benefited from the tenancy by carrying on a commercial venture on land categorized as agricultural, it is improper for the defendant to now cry foul and raise his own iniquity with impunity.

The appeal stands dismissed with costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee